

# Arent Fox

October 18, 2007

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Dkt No. 07-51**

Dear Ms. Dortch:

The undersigned represents S2N Technology California LLC ("S2N"). S2N is a provider of voice, video and data communications services (i) to apartment complexes, and (ii) to federal government housing, such as naval bases, located on federal land.

S2N does not, at this time, take a position on whether the Commission should impose some restrictions on exclusive cable contracts in MDUs. But S2N strongly believes that if the Commission decides to place some restrictions on exclusive cable contracts in MDUs, it should not

1. Place any restrictions on exclusive cable contracts in MDUs that are executed by providers without market power; or
2. Place any restrictions on exclusive cable contracts in MDUs located on federal land, such as naval bases.

## **Lack of Market Power**

The Commission has asked whether, if it decides to place some restrictions on exclusive cable contracts, it should place those restrictions even on operators who lack market power. The answer to that question is clearly no.

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The Commission has stated that its objective in this proceeding is to increase the amount of competition in the video market. Yet, prohibiting exclusive agreements by providers without market power will not only fail to increase competition in the video market – it will do just the opposite. The record is replete with comments from providers who have indicated that for a wide variety of reasons, including recouping their investments and obtaining financing, they need to be able to enter into exclusive agreements at MDUs in order to be able to operate profitably and create additional competition to the incumbent providers in the marketplace as a whole. Thus, imposing regulations that prohibit them from entering into exclusive agreements will directly lead to a decrease in the number of video service providers in this country.

The Commission recognizes that 47 U.S.C. § 521(6) states that one of the purposes of Title VI is “to promote competition in cable communications.” **To say the least, it would not promote competition in cable communications to issue a regulation that directly results in a decrease in the number of video competitors. That is, if the Commission eliminates exclusive agreements, it will also, in effect, eliminate many competitors from the marketplace.**

Several years ago, the Commission considered these same issues and concluded that it lacked sufficient information to place any restrictions on exclusive cable contracts for any providers, including even those with market power. Since that time the amount of video competition has increased dramatically, and therefore there still does not appear to be any need for restrictions regarding exclusive contracts in MDUs. But if the Commission concludes otherwise, it certainly should not paint with such a broad brush as to burden all providers with such restrictions, including even those with no market power.

As the Commission is well aware, it often considers the market power of entities before deciding whether to place restrictions upon them. Such an approach is certainly appropriate here (if the Commission even decides to impose any restrictions at all). Indeed, here the Commission is considering placing restrictions that would burden the rights of parties to freely contract with sophisticated property owners. Any such restrictions, even if appropriate, would need to be very narrowly tailored, and certainly should not include contracts between property owners and providers lacking market power.

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Moreover, most commenters favor continuing to permit exclusive agreements at MDUs, and the few that do not primarily allege that the largest incumbent operators are seeking to use exclusive agreements to prevent competition in the marketplace. Needless to say, the small operators who lack market power, such as S2N, have no ability to limit competition in the marketplace, and barring exclusive agreements for such operators will only serve to eliminate many of them from the marketplace, thereby reducing competition.

### **Federal Land**

There is no indication in the record that exclusive agreements on federal land, such as naval bases, are causing any competitive harm whatsoever. Moreover, the federal government is highly sophisticated and is very well-suited to determine which providers should be permitted to provide services on its land. In addition, it is highly unlikely that the Commission actually has the authority, even if it wished to do so, to prohibit exclusive cable agreements on federal land, such as agreements entered into by departments of the federal government who control such federal land or by those whom such departments authorize to execute agreements relating to the provision of cable service on federal lands.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan Fishel" with a stylized flourish at the end.

Alan Fishel  
Attorney for S2N Technology California LLC